Nos. 14-614 & 14-623

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In The Supreme Court of the United States

DOUGLAS R.M. NAZARIAN,
in his official capacity as Chairman of the
Maryland Public Service Commission, *et al.*,
Petitioners,

v.

PPL ENERGYPLUS, LLC, *et al.*,
Respondents.

CPV MARYLAND, LLC,
Petitioner,

v.

PPL ENERGYPLUS, LLC, *et al.*,
Respondents.

On Petitions For A Writ Of Certiorari To The Fourth Circuit Court Of Appeals

BRIEF OF THE STATES OF CONNECTICUT, IOWA, MAINE, NEW MEXICO AND WASHINGTON, THE NEW ENGLAND CONFERENCE OF PUBLIC UTILITY COMMISSIONERS, THE CALIFORNIA PUBLIC UTILITIES COMMISSION, THE PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, THE VERMONT DEPARTMENT OF PUBLIC SERVICE, THE VERMONT PUBLIC SERVICE BOARD, THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, THE MARYLAND OFFICE OF PEOPLE'S COUNSEL, THE NEW JERSEY DIVISION OF RATE COUNSEL AND THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, CONSUMER ADVOCATE DIVISION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*[1]

The *amici curiae* are states with a vital interest in the ability to ensure an adequate supply of electricity and to achieve state renewable energy goals, state public utility commissions that regulate public utilities and state utility consumer advocates who represent the interests of electric customers. The *amici* are listed in the Addendum to this brief (the "Amici States"). The interests of the Amici States are threatened by the Fourth Circuit's decision, which incorrectly found a resource procurement effort of the State of Maryland Public Service Commission ("Maryland") to be both field preempted and conflict preempted.

Because electricity is and has been a fundamentally necessary service for more than one hundred years, each state is obligated through its police powers to ensure an adequate supply of electricity to its citizens. The Fourth Circuit held that when Maryland procured resources to ensure an adequate supply of electricity to its citizens, it entered a field occupied by the federal government and intruded on the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). Thus, despite Maryland's historic role with respect to

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[1] No other person than the named *amici curiae* or their counsel authored this brief or provided financial support for it. Pursuant to Supreme Court Rule 37.2(a), timely notice of an intent to file this brief was provided counsel for the parties, and all parties have consented to the filing of this brief.

generating facilities in that state, and despite the explicit recognition of states' role in the Federal Power Act of 1935 ("FPA") with respect to generating facilities, Maryland's resource procurement effort was incorrectly determined to be both field preempted and conflict preempted. The Amici States have an interest in this case because state-conducted resource procurement efforts could ultimately be preempted on the same basis as Maryland's efforts, or by an extension of the Fourth Circuit's rationale to other state procurement efforts. Thus, their ability to ensure an adequate supply of electricity to their citizens could be severely diminished, impacting not only renewable energy programs or other state environmental programs, but also electric reliability.

REASONS FOR GRANTING THE WRIT

The State of Maryland exercised long-standing, well-established resource adequacy powers that pre-existed the FPA, and are explicitly recognized as part of state jurisdiction under the FPA. The Fourth Circuit incorrectly found those powers to be field preempted, thereby depriving states of their police powers and their rights under the FPA.

I. The Fourth Circuit's Decision Improperly Precludes States From Ensuring Adequate Electric Generation.

In procuring resources to meet local needs, Maryland acted in an area of longstanding state jurisdiction and responsibility that was not interrupted by either enactment of the FPA in 1935 or Maryland's decision to restructure its electric industry.[2] Prior to enactment of the FPA, states possessed extensive regulatory powers over the siting, generation, transmission, distribution and sale of electric energy, though limited by the dormant Commerce Clause. *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 471-472 (4th Cir. 2014). Enactment of the FPA created affirmative federal jurisdiction over the interstate aspects of electric energy.[3] Under the FPA, states retained exclusive express jurisdiction over facilities used for the generation of electric energy.[4]

Consistent with this balancing of jurisdiction, Maryland conducted a competitive solicitation for

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[2] The typical form of electric restructuring is when a state separates the function of generating electricity from transmission and distribution, and allows competitive supply of retail electric service to customers.

[3] The FPA vests FERC with authority over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1).

[4] FERC "shall not have jurisdiction over facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(2).

the construction of new electric generation to ensure a sufficient supply of electric capacity. The solicitation resulted in a contract under which the winning bidder was obligated to construct a generating facility in Maryland, paid for by Maryland ratepayers. The contract also required the winning bidder to sell capacity and energy into regional electricity markets. Maryland did not, as the Fourth Circuit held, attempt to regulate the rates at which electric energy or electric capacity is sold in interstate commerce. *Cf. PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d at 476.

Maryland is responsible to ensure an adequate supply of electric generating capacity and conducted the competitive solicitation for this purpose. The contract that resulted from Maryland's competitive solicitation directly accomplished this purpose when it obligated the winning bidder to construct a generating facility, and to sell capacity and energy into regional electricity markets operated pursuant to administrative orders approved by FERC. When Maryland procured electric generating capacity and brought about the contract between CPV Maryland, LLC and the electric distribution company, it acted to ensure an adequate supply of electric generating capacity in the State of Maryland.

In doing so, it acted in accordance with the jurisdiction retained by states under the FPA. This Court has expressly recognized that states retain "authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side

decisions, including DSM [demand-side management]; authority over utility generation and resource portfolios; and authority to impose nonbypassable distribution or retail stranded cost charges." *New York v. FERC*, 535 U.S. 1, 24 (2002), citing Order No. 888, at 31,782, n.544.[5] Maryland's actions, ensuring adequate electric generating capacity to meet Maryland's needs, fall clearly under the categories of reliability, integrated resource planning[6] and buy-side decision-making designated for state jurisdiction under the FPA.

Maryland's actions represent a field traditionally occupied by the States. "Where . . the field in which Congress is said to have pre-empted has been

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[5] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,539 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[6] Integrated resource planning generally examines expected demands and resources over a long term period and seeks to ensure an adequate supply of resources (including a reserve margin) to serve customers, and may incorporate state objectives such as diversification of resources and development of renewable energy.

traditionally occupied by the States 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Consequently, having acted within its traditional sphere, Maryland is entitled under this Court's rulings to a presumption of non-preemption.

The Fourth Circuit failed to recognize the presumption of non-preemption owed Maryland. Nor did the Fourth Circuit find, as it must under *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, that the FPA shows a clear and manifest purpose for federal entry into integrated resource planning, reliability of local service, or buy-side and demand-side decisions. It did not recognize Maryland's actions as addressing resource adequacy and electric generation. Instead, it erroneously redefined Maryland's actions as supplanting a federally-administered auction by functionally setting the rates of wholesale capacity sales. *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d at 476-477.

Contrary to the Fourth Circuit's ruling, Maryland did not set the rates of wholesale services. It brought buyers and sellers together for the purpose of reaching a bilateral agreement. Maryland did not set a price for capacity based upon a bidder's internal costs; rather, the bidders set the price at which they were willing to meet the entirety of the obligations

set forth in the contract (to construct and operate a generating facility in the state, and to be counted, for capacity purposes, in the capacity market run by the regional transmission organization, PJM Interconnection LLC).

Further, the price was determined by competitive market forces, not by Maryland. This process is entirely consistent with the market-based tariff regime established by FERC, and recounted by this Court in *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Wash.*, 554 U.S. 527, 535-538 (2008). Under FERC's market-based tariff regime, so long as a seller lacks market power, freely negotiated contracts result in just and reasonable rates. *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004). When a state commission exercises its resource adequacy powers under the FPA by soliciting bids, its action is consistent with the FPA's jurisdictional divide and with FERC's market-based tariff regime because it is merely bringing together buyers and sellers. Here, Maryland, through its competitive solicitation, brought buyers and sellers together to negotiate a contract. Sellers freely formulated and submitted offers, which were ranked and compared, and the winning bidder was chosen. At no point did Maryland determine a just and reasonable rate based upon the revenues and expenses of any bidder.

In fact, states bring buyers and sellers together in many contexts, but in none of those contexts has FERC or any court determined that the state set

wholesale rates. States bring buyers and sellers together to ensure an adequate supply of standard service is properly procured (standard service is retail electricity service provided to customers who do not choose competitive supply). *Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082, PP 18, 36-39 (2004); Conn. Gen. Stat. § 16-244c. Further, states ensure that renewable energy goals are met by setting targets and conducting resource procurements at market-based prices. *Otter Creek Solar LLC*, 143 FERC ¶ 61,282, P 4 (2013), 30 Vermont Statutes Annotated §§ 8005a and 8006a; Conn. Gen. Stat. § 16-244v, 16a-3f, 16a-3g and 16a-3h.[7]

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[7] Connecticut has already procured resources under General Statutes of Connecticut § 16a-3f. Though the State procured physical energy and capacity, and did not procure using contracts for differences, its procurement under this statute has been challenged in United States District Court, where plaintiffs allege that the State has entered a field occupied by Congress merely by selecting the winning bid. Plaintiff alleged that Connecticut's actions are field preempted, expressly citing as support the District Court decision below in the instant case (*PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp. 2d 790 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014)). *See*, First Amended Complaint for Declaratory and Injunctive Relief for Violations of the Supremacy Clause of the United States Constitution and the Federal Power Act, ¶ 89, *Allco Fin. Ltd. v. Klee*, No. 3:13cv1874 (JBA) (D. Conn., Feb. 26, 2014). That complaint was dismissed on December 10, 2014. *Allco Fin. Ltd. v. Klee*, No. 3:13cv1874 (JBA), 2014 WL 7004024 (D. Conn., Dec. 10, 2014). As of the date of this brief, the time for appeal of *Allco v. Klee* has not yet expired.

Beyond the states' role in establishing renewable energy policy, many, if not all states, conduct some form of either integrated resource planning or long term procurement planning to meet energy needs, regardless of whether they have restructured their electric industry. For example, the State of Connecticut's integrated resource plan requirement is set forth in statute, and specifies the actions to be taken if the plan identifies an anticipated shortfall in resources. Conn. Gen. Stat. § 16a-3a. The State of Delaware, also a restructured state, requires its electric utility to conduct integrated resource planning. Del. Code Ann. tit. 26, § 1007. The State of Michigan has, throughout its experience as a partially restructured state (no more than ten percent of an electric utility's load can be served by a competitive supplier), conducted annual investigations into the adequacy and reliability of electric generation capacity. Indeed, Michigan's latest such inquiry takes note that the Midwest Independent System Operator now anticipates a 3,000 megawatt shortfall in electric generation capacity in 2016. December 4, 2014 Order in Case No. U-17751, *In the Matter of the Investigation, on the Commission's Own Motion, Into the Supply Reliability Plans of Michigan's Electric Utilities for the Years 2015 Through 2019*, p. 4.[8] The California Public Utilities Commission conducts long-term procurement planning and authorizes the state's investor-owned utilities to enter into contracts to

[8] http://efile.mpsc.state.mi.us/efile/docs/17751/0001.pdf.

construct new generation resources when necessary for reliability. *See* Cal. Pub. Utils. Code § 454.5.

States whose integrated resource planning forecasts a future shortfall in generation will seek to bring buyers and sellers together to help ensure reliability. *See, e.g.*, Conn. Gen. Stat. § 16a-3b(b). The Fourth Circuit's holding threatens the states' ability to respond to identified shortfalls, and can render their integrated resource planning a fruitless exercise.

Worse, if the mere act of bringing together buyers and sellers for the purpose of ensuring reliability or furthering renewable energy goals is field preempted, all states face an increased risk of preemption as a result of the Fourth Circuit's holding.

By focusing its analysis on the State of Maryland, and not the FPA, the Fourth Circuit's decision wrongly creates distinctions between states that do not exist in the FPA itself. The Fourth Circuit's decision could be interpreted as holding that Maryland is field preempted because Maryland restructured its electric market and now participates in a federally-administered capacity market. *See, e.g.*, *PPL EnergyPlus, supra*, 753 F.3d at 473. Under such a reading, resource adequacy decisions made by non-restructured states are presumably not field preempted, while those made by states which participate in federally-administered capacity markets are field preempted.

However, field preemption springs from Congressional action, and not from a state's decisions.

When considering preemption, no matter which type, "[t]he purpose of Congress is the ultimate touchstone." *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003), citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). The federal statutory scheme at issue here is the FPA, but the FPA provides exclusive state authority over electric generation and resource adequacy planning, and does not distinguish between restructured and non-restructured states. *See* 16 U.S.C. § 824(b)(2). Congressional intent expressed in 16 U.S.C. § 824(b)(2) unequivocally provides exclusive state jurisdiction over electric generation. Though the FPA's jurisdictional statutes do not distinguish between states which have restructured and those which have not, or states which participate in federally-administered capacity markets and those which do not, the Fourth Circuit decision improperly creates a jurisdictional divide under which some states possess their full electric generation and resource adequacy powers under the FPA, and other states do not.

II. The Federal Power Act Does Not Require States to Rely Solely Upon Federal Wholesale Market Mechanisms to Ensure Reliable Electric Power.

All states face resource adequacy issues. The existing fleet of generating facilities will age and require replacement, and states will experience load growth. Under the Fourth Circuit's holding, however, states that have restructured and participate in

federally-administered capacity markets are deprived of an essential tool to address resource adequacy.

There is no basis to conclude that states abdicated all responsibility to ensure resource adequacy when restructuring. No provision of the FPA provides that when a state restructures, its resource adequacy powers and responsibilities shift to the federal government. Federal interstate markets only attempt to create the conditions under which investors generally may build electric generating facilities—if those markets fail, neither FERC nor any regional transmission organization can order the construction of a new generating facility. Nothing in the FPA requires that a state gamble upon whether those markets succeed, and suffer the consequences, potentially including actual outages and significant financial penalties, if they do not.

Indeed, an ongoing case from the State of New York illustrates the manner in which electric reliability is threatened by this case. The State of New York is anticipating potential reliability concerns as a result of generating facility retirements, and is acting to prevent shortages. January 18, 2013 Order Instituting Proceeding and Requiring Evaluation of Generation Repowerings, New York Public Service Commission Case No. 12-E-0577, *Proceeding on Motion of the Commission to Examine Repowering*

Alternatives to Utility Transmission Reinforcements. Specifically, the New York Public Service Commission directed utilities under its regulatory authority to evaluate repowering of existing generating facilities as an option to address reliability needs. *Id.*, p. 3. That proceeding is ongoing at the administrative agency level, but opponents already cite the District Court's decision in this matter to raise field preemption and thwart these important reliability efforts. *See* May 27, 2014 Comments of Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Indian Point2, LLC, Entergy Nuclear, Indian Point 3, LLC and Entergy Nuclear Operations, Inc. in Case No. 12-E-0577, *supra*, p. 6.[10]

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[9] http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={6D9D8176-BF93-4842-9FE3-FB933427D179}.

[10] http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={508E316D-F1B7-4E84-9C7B-D664965AF05B}.

CONCLUSION

This Court should review the Fourth Circuit's decision because it threatens states' ability to ensure an adequate supply of electricity and to achieve state renewable energy goals. For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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